Maraldo Asphalt Paving, Inc. *and* **Local 324, International Union of Operating Engineers, AFL-CIO.** Case 7-CA-18836

April 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

Upon a charge filed on January 30, 1981, by Local 324, International Union of Operating Engineers, AFL-CIO, herein called the Union or the Charging Party, and duly served on Maraldo Asphalt Paving, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint and notice of hearing on May 5, 1981, against Respondent, alleging that Respondent has engaged in, and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act. Copies of the charge and complaint and notice of hearing were duly served on the parties to this proceeding. Respondent has failed to file an answer to the complaint.

On February 16, 1982, counsel for the General Counsel filed directly with the Board a "Motion To Transfer Case to the Board and for Default Judgment,"[1] with exhibits attached, based on Respondent's failure to file an answer as required by Section 102.20 of the Board's Rules and Regulations, Series 8, as amended. An Order Transferring Proceeding To The Board and Notice To Show Cause was issued on February 22, 1982. Respondent has filed no response to the Notice To Show Cause and, accordingly, the allegations of the Motion for Default Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent specifically stated that unless an answer to the complaint was filed within 10 days from the service thereof "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." According to the uncontroverted allegations of the Motion for Default Judgment, Respondent has at all times failed to file an answer to the complaint. Subsequent to the issuance of the complaint on May 5, 1981, the Regional Attorney for Region 7 sent a letter to Respondent dated January 15, 1982, in which the Regional Attorney extended the time for filing an answer to January 25, 1982, and advised Respondent again of the requirement for filing an answer and the possibility for default judgment if no answer were filed. Respondent has not since that time filed an answer. As noted above, Respondent has also failed to file a response to the Notice To Show Cause.

No good cause having been shown for the failure to file a timely answer, in accordance with the rule set forth above, the allegations of the complaint are deemed admitted and are found to be true. We shall, accordingly, grant the Motion for Default Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Michigan corporation with an office and place of business located at 415 East Hudson, Royal Oak, Michigan, where it is engaged in the nonretail asphalt paving business. During the year ending December 31, 1980, a representative period, Respondent, in the course and conduct of its business operations, had gross revenues in excess of $75,000 and performed services valued in excess of $50,000 for customers located within the State of Michigan, which customers, individually, purchased and received goods and materials valued in

[1] Aside from the title of this motion, used in deference to the Sixth Circuit's opinion in *N.L.R.B.* v. *Aaron Convalescent Home*, respects the same as those normally entitled "Motion for Summary Judgment" and filed pursuant to Secs. 102.20, 102.24, and 102.50 of the Board's Rules and Regulations, Series 8, as amended. It is, accordingly, treated in the same manner.

excess of $50,000 directly from points outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 324, International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Since on or about September 26, 1969, and at all times material herein, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All operating engineer employees employed by Respondent and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324–A, 324–B and 324–C, AFL–CIO, effective from June 1, 1977 to June 1, 1980, and from year to year thereafter.

Since August 1980, and continuing to date, Respondent has refused to bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit described above by its conduct in unilaterally, and without prior bargaining with the Union, modifying a term of the collective-bargaining agreement effective from June 1, 1977, to June 1, 1980, and from year to year thereafter by ceasing to make payments to the Operating Engineers Fringe Benefit Funds as required in the collective-bargaining agreement referred to above.

By the aforementioned refusal to bargain, Respondent has engaged in and is engaging in unfair labor practices, affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action to remedy Respondent's unfair labor practices will include the payments to the Operating Engineers Fringe Benefit Funds which have been earned by Respondent's employees in accordance with the terms of the collective-bargaining agreement between Respondent and the Union.[2]

CONCLUSIONS OF LAW

1. Maraldo Asphalt Paving, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating engineer employees employed by Respondent and encompassed in the collective-bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324–A, 324–B and 324–C, AFL–CIO, effective from June 1, 1977, to June 1 1980, and from year to year thereafter constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about September 26, 1969, and at all times material herein, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing since August 1980, and continuing to date, to bargain with the Union as the exclusive collective-bargaining representative of employees

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[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the fringe benefits funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portions of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

in the aforesaid appropriate unit by its conduct in unilaterally, and without prior bargaining with the Union, modifying a term of the collective-bargaining agreement effective from June 1, 1977, to June 1, 1980, and from year to year thereafter between Respondent and the Union by ceasing to make payments to the Operating Engineers Fringe Benefit Funds as required in the aforementioned collective-bargaining agreement, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Maraldo Asphalt Paving, Inc., Royal Oak, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 324, International Union of Operating Engineers, AFL-CIO, by the conduct of modifying a term of the collective-bargaining agreement effective from June 1, 1977, to June 1, 1980 and from year to year thereafter by ceasing to make payments to the Operating Engineers Fringe Benefit Funds as required in said collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Honor and abide by the provisions of the collective-bargaining agreement effective from June 1, 1977, to June 1, 1980, and from year to year thereafter between Respondent and the Union throughout the term of the agreement.

(b) Make appropriate payments to the Operating Engineers Fringe Benefit Funds for the fringe benefits earned by Respondent's employees during the term of the collective-bargaining agreement in accordance with the provisions of the collective-bargaining agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(d) Post at its Royal Oak, Michigan, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 324, International Union of Operating Engineers, AFL-CIO,as the exclusive collective-bargaining representative of the employees in the unit described below by unilaterally, and without prior bargaining with the Union, modifying a term of our collective-bargaining agreement with the Union effective from June 1, 1977, to June 1, 1980, and from year to year thereafter, by ceasing to make payments to the Operating Engineers Fringe Benefit Funds as required by the agreement. The appropriate collective-bargaining unit is:

> All operating engineer employees employed by us and encompassed in the collective bargaining agreement between the Labor Relations Division of the Michigan Road Builders Association and the International Union of Operating Engineers Local No. 324, 324-A, 324-B and 324-C, AFL-CIO, effective from June 1, 1977 to June 1, 1980, and from year to year thereafter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL honor and abide by the provisions of the collective-bargaining agreement with the Union, effective from June 1, 1977, to June 1, 1980, and from year to year thereafter, throughout the term of the agreement.

WE WILL make appropriate payments to the Operating Engineers Fringe Benefit Funds for the fringe benefits earned by our employees during the term of the collective-bargaining agreement and in accordance with the provisions of the collective-bargaining agreement.

MARALDO ASPHALT PAVING, INC.